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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

ANIMAL LEGAL DEFENSE FUND, a
California corporation; and REGAL
VEGAN, INC., a New York
corporation;

Plaintiffs,

– against –

HVFG LLC, a New York limited
liability company;
MARCUS HENLEY, an individual;
MICHAEL GINOR, an individual;
IZZY YANAY, an individual; and
RICHARD BISHOP, an individual;

Defendants.

Case No. C 12-05809 WHA

**NOTICE OF RULING IN
RELATED CASE**

Date: April 4, 2013

Time: 11:00 a.m.

Place: Courtroom 8

Hon. William H. Alsup

1 TO THE COURT AND ALL PARTIES:

2 PLEASE TAKE NOTICE that, on March 22, 2013, the Hon. Otis D. Wright II of
3 the United States District Court for the Central District of California issued a ruling
4 in *Animal Legal Defense Fund and Regal Vegan, Inc., et al. v. United States Department*
5 *of Agriculture et al.*, case no. 2:12-cv-4028-ODW(PJWx) (the “Central District
6 action”), granting the defendants’ motion for judgment on the pleadings for lack of
7 subject-matter jurisdiction and dismissing that action *with prejudice*.

8 The Central District action was filed by the same plaintiffs who filed this action,
9 i.e., Plaintiffs Animal Legal Defense Fund (“ALDF”) and Regal Vegan, Inc. (“Regal
10 Vegan”).¹ The Central District action was premised on Plaintiffs’ allegations — which
11 had already been rejected by the United States Department of Agriculture — that
12 “[f]orce-feeding *induces disease* and disability in foie gras ducks and geese.” (See ECF
13 Dkt. No. 1 [Complaint at p. 2, ln. 19] in the Central District action.) Plaintiffs’ claims
14 in this action are likewise premised on their allegations that Defendants’ foie gras is
15 produced by “force feeding ducks and geese to *induce a liver disease*.” (Compl. ¶ 1.)

16 Plaintiffs’ 202-paragraph complaint in the Central District action included many
17 of the very same allegations that they make in their 178-paragraph complaint in this
18 action, in which they claim that foie gras is “inhumane” based on allegations that it is
19 “diseased.” For example, right below the heading “Foie Gras Production is Cruel and
20 Inhumane,” Plaintiffs allege in this action that “[f]orce-fed ducks suffer” from
21 numerous problems “related to the force-feeding process” and that “[m]ost problems
22 . . . are the result of the duck’s liver growth *and resulting disease*.” (Compl. ¶ 58.)

23 Defendants call the Court’s attention to this recent ruling in the Central District
24 action because Plaintiffs’ opposition to Defendants’ pending motions to dismiss under
25 FRCP 12(b)(1) and 12(b)(6) cites these same allegations of “disease” (ECF Dkt. No. 36
26

27 ¹ While Defendant HVFG LLC (“Hudson Valley”) was not a named defendant in
28 the Central District action, Hudson Valley was granted amicus curiae status in that
action “at all stages of the proceeding.”

[Opp. to 12(b)(1) motion] at p. 3, Ins. 16-21; ECF Dkt. No. 43 [Opp. to 12(b)(6) motion] at p. 3, Ins. 8-13) and Plaintiffs continue to argue that a “consumer could reasonably conclude that a humanely raised animal was not intentionally subjected to a *painful liver disease*.” (Opp. to 12(b)(6) motion at p. 17, Ins. 26-27.) Given that Plaintiffs’ claims about foie gras production “inducing disease” not only were rejected by the USDA but also have now been dismissed *with prejudice* by another federal district court for lack of standing, this Court should not hesitate to dismiss this case with prejudice either.²

A copy of Judge Wright’s order is attached hereto. *See, e.g.*, p. 5, Ins. 26-28 (“The USDA’s denial of Plaintiffs’ petition shows that it disagrees with Plaintiffs’ viewpoint that force-fed foie gras is adulterated or diseased: the USDA reaffirms that it is not.”).

Dated: March 28, 2013

/s/ Michael Tenenbaum

Michael Tenenbaum, Esq.
 THE TENENBAUM LAW FIRM
*Counsel for Defendants HVFG LLC,
 Marcus Henley, Michael Ginor, Izzy
 Yanay, and Richard Bishop*

² As the Court may recall from the parties’ Joint Case Management Statement, at the time ALDF commenced this case, it was also suing Hudson Valley and various others in New York in case no. 8330-10 in the Supreme Court of New York, County of Albany. In that case, ALDF sought, *inter alia*, a declaration that foie gras is adulterated, and it relied on many of the same allegations that form the basis of this lawsuit. On January 23, 2013, the Court in that case granted the motion of Hudson Valley and the other defendants to dismiss ALDF’s lawsuit for lack of standing. (*See* ECF Dkt. No. 32.)

ATTACHMENT

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7 **UNITED STATES DISTRICT COURT**
8 **CENTRAL DISTRICT OF CALIFORNIA**
9

10 ANIMAL LEGAL DEFENSE FUND;
11 REGAL VEGAN, INC.; SARAH EVANS;
12 MICHELLE SCHURIG; CAROLINE
13 LEE; DANIEL STAHLIE; FARM
SANCTUARY; COMPASSION OVER
AND RESCUE LEAGUE,

14 Plaintiffs,

15 v.

16 UNITED STATES DEPARTMENT OF
17 AGRICULTURE; TOM VILSACK;
FOOD SAFETY AND INSPECTION
SERVICE; and ALFRED V. ALMANZA,

18 Defendants.
19

Case No. 2:12-cv-4028-ODW(PJWx)

**ORDER RE PLAINTIFFS' MOTION
FOR SUMMARY JUDGMENT [22]
AND DEFENDANTS' MOTION FOR
JUDGMENT ON THE PLEADINGS
[26]**

20 **I. INTRODUCTION**

21 Pending before the Court are Plaintiffs' Motion for Summary Judgment and
22 Defendants' Motion for Judgment on the Pleadings with respect to subject-matter
23 jurisdiction. (ECF Nos. 22, 26.) The Court concludes that Defendants' denial of
24 Plaintiffs' Petition is unreviewable under 5 U.S.C. § 701(a). Thus, for the reasons
25 discussed below, Plaintiffs' Motion for Summary Judgment is **DENIED AS MOOT**
26 and Defendants' Motion for Judgment on the Pleadings is **GRANTED**.¹

27 ¹ Having carefully considered the papers filed in support of and in opposition to the instant Motions,
28 the Court deems these matters appropriate for decision without oral argument. Fed. R. Civ. P. 78;
L.R. 7-15.

II. BACKGROUND

On November 28, 2007, several of the current Plaintiffs petitioned the United States Department of Agriculture (“USDA”) and Food Safety and Inspection Service (“FSIS”) to promulgate regulations condemning force-fed foie gras as an adulterated food product under the Poultry Products Inspection Act (“PPIA”), 21 U.S.C. §§ 451–472. (Compl. ¶ 3; Ex. A.) The FSIS, an agency of the USDA, denied their petition. (*Id.* ¶ 3; Ex. B.) The FSIS reasoned that force-fed foie gras was not adulterated or diseased, and that its continued availability in the poultry market was not in violation of the PPIA. (*Id.*)

The PPIA sets standards for the USDA to regulate the production and sale of poultry in order to protect consumers from adulterated poultry products. 21 U.S.C. § 452. It requires ante mortem and post mortem inspections of poultry products to ensure that they are safe for human consumption. 21 U.S.C. § 455. Under FSIS directives, poultry inspectors are instructed to deem wholesome any poultry livers with a uniform yellow color, resulting from excessive fat deposits. (Compl. ¶ 89.) Plaintiffs contend that this policy allows force-fed foie gras livers to escape condemnation because they have a uniform yellow color as result of fatty infiltration. (*Id.* ¶ 91.) And Plaintiffs suggest that the USDA is inconsistent: it condemns broiler chickens with certain disease conditions, but not force-fed foie gras exhibiting the same conditions. (*Id.* ¶ 93.)

Plaintiffs allege that the consumption of force-fed foie gras poses risks to human health because it contains insoluble protein fragments that can cause secondary amyloidosis, especially in persons who suffer from inflammatory diseases. (*Id.* ¶¶ 9–12.) They also claim that the proteins may encourage the development of other amyloid-associated disorders, including Alzheimer’s disease or Type II diabetes. (*Id.* ¶ 13.) Plaintiffs admit these proteins are common to waterfowl generally, but contend that the proteins are more prevalent in foie gras. (*Id.* ¶ 14.) Plaintiffs also allege that harmful bacteria including *E. coli* have been found in force-fed foie gras. (*Id.* ¶ 6.)

1 Plaintiffs filed this lawsuit to challenge the legality of FSIS's denial, claiming
2 the decision was arbitrary, capricious, and contrary to law, in violation of the
3 Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(a). (Compl. ¶ 4.)
4 Plaintiffs now move for summary judgment that FSIS's denial violated the APA.
5 (ECF No. 22.) In response, Defendants moved for judgment on the pleadings that
6 Plaintiffs lack standing, or in the alternative, for summary judgment that FSIS's denial
7 was proper and within its discretion. (ECF No. 26.)

8 III. LEGAL STANDARD

9 A motion for judgment on the pleadings is "functionally identical" to a Rule
10 12(b) motion to dismiss; the only major difference is that a Rule 12(c) motion is
11 properly brought "after the pleadings are closed and within such time as not to delay
12 the trial." *Mag Instrument, Inc. v. JS Prods., Inc.*, 595 F. Supp. 2d 1102, 1106–07
13 (C.D. Cal. 2008) (citing *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1192 (9th
14 Cir. 1989)). Thus, the allegations of the non-moving party are accepted as true,
15 denials of these allegations by the moving party are assumed to be false, and all
16 inferences reasonably drawn from those facts must be construed in favor of the
17 responding party. *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542,
18 1550 (9th Cir. 1989). But conclusory allegations and unwarranted inferences are
19 insufficient to defeat a motion for judgment on the pleadings. *In re Syntex Corp. Sec.*
20 *Litig.*, 95 F.3d 922, 926 (9th Cir. 1996). Judgment on the pleadings is appropriate
21 when, even if all material facts in the pleading under attack are true, the moving party
22 is entitled to judgment as a matter of law. *Hal Roach Studios*, 896 F.2d at 1550.

23 IV. DISCUSSION

24 Article III of the Constitution limits federal-court jurisdiction to cases and
25 controversies. Thus, whenever it appears by suggestion of the parties or otherwise
26 that the court lacks jurisdiction of the subject matter, the court must dismiss the
27 action. Fed. R. Civ. P. 12h(3); see *Chapman v. Pier 1 Imports (U.S.) Inc.*, 631 F.3d
28 939, 954 (2011).

1 The PPIA does not create a private right of action for citizens, so a plaintiff
2 suing for a PPIA violation must bring suit under the APA. The APA generally entitles
3 an aggrieved plaintiff to judicial review of an adverse agency action. 5 U.S.C. § 702.
4 But judicial review of an agency action is unavailable if (1) a statute precludes judicial
5 review or (2) the agency action is “committed to agency discretion by law.” 5 U.S.C.
6 § 701(a).

7 In this case, though the PPIA does not allow for a private action, there is also no
8 indication that the PPIA expressly precludes judicial review; so § 701(a)(1) does not
9 apply here. And as for as for agency actions committed to agency discretion by law
10 under § 701(a)(2), this does not apply to agency inaction except under narrow
11 circumstances. *Heckler v. Chaney*, 470 U.S. 821, 832 (1985).

12 Indeed, an agency’s decision to not “take enforcement action [is] presumed
13 immune from judicial review under § 701(a)(2).” *Id.* An agency has broad discretion
14 to choose how best to allocate its resources to perform its delegated responsibilities.
15 *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–845
16 (1984). This discretion is “at its height when the agency decides not to bring an
17 enforcement action.” *Massachusetts v. EPA*, 549 U.S. 497, 527 (2007).

18 One instance of this discretion involved the FDA’s denial of a petition to ban
19 the use of several drugs that—though approved by the FDA for the medical purposes
20 stated on their labels—were not approved for use in human executions and were not
21 deemed “safe and effective” for that use under the applicable statutes. *Heckler*, 470
22 U.S. at 823–24. In that case, the Supreme Court sided with the FDA and held that the
23 petition denial was unreviewable because there were no “judicially manageable
24 standards . . . for judging how and when an agency should exercise its discretion.” *Id.*
25 at 830. The fact that an agency may not carry out their delegated powers with
26 “sufficient vigor” does not mean that the courts are necessarily the appropriate vehicle
27 to police this aspect of the agency’s performance. *Id.* at 834. If Congress has
28 imposed standards to define an agency’s discretion, then there is “law to apply” and

1 the agency's decision is reviewable; otherwise, it is a decision "committed to agency
2 discretion by law." *Id.* at 835; § 701(a)(2).

3 But there is an exception for denials of a petition for rulemaking. These denials
4 differ from an agency's decisions not to initiate an enforcement action: the latter are
5 rarer, more apt to involve legal instead of factual analysis, and subject to special
6 formalities. *Id.* For instance, in *Massachusetts v. EPA*, the EPA denied plaintiffs'
7 petition requesting that it promulgate rules to regulate four greenhouse gases,
8 including carbon dioxide, emitted from new motor vehicles. *Id.* at 505. The Supreme
9 Court concluded that under those facts, the affected party had an undoubted
10 procedural right to file the petition in the first instance—thus, the EPA's refusal to
11 promulgate new rules was susceptible to judicial review. *Id.* at 527–28.

12 Here, Plaintiffs' underlying petition in this case asks the USDA to ban force-fed
13 foie gras from the human food supply. (Compl. Ex. A at 2.) The basis for this
14 petition is Plaintiffs' assertion that force-fed foie gras is adulterated and should be
15 condemned under 21 U.S.C. § 453(g)(3) and § 455. Poultry livers, including force-
16 fed foie gras, are already regulated by the USDA under those statutes. (Compl. ¶ 89.)

17 Though titled "PETITION FOR RULEMAKING," Plaintiffs' request seeks to
18 ban force-fed foie gras under existing laws and regulations: it is not a request to make
19 new rules or modify existing rules. The Court notes that any agency discretion could
20 be characterized as a rule, and therefore under *Massachusetts v. EPA*, would be
21 presumably reviewable by the courts. But that is form over substance. Plaintiffs
22 merely seek to persuade the USDA to conclude that *all* force-fed foie gras, by
23 definition, are adulterated and diseased.

24 Plaintiffs' voluminous submission of technical papers and data supports the
25 Court's view that Plaintiffs are challenging a scientific conclusion and not a legal one.
26 (Compl. Ex. A.) The USDA's denial of Plaintiffs' petition shows that it disagrees
27 with Plaintiffs' viewpoint that force-fed foie gras is adulterated or diseased: the USDA
28 reaffirms that it is not. (Compl. Ex. B.) This controversy concerns scientific evidence

1 suggesting that force-fed foie gras should be banned under existing laws and
2 regulations. This controversy isn't about promulgating rules.

3 The Court leaves this scientific conclusion for the USDA to decide based on its
4 expertise in the field. *See Heckler*, 470 U.S. at 831. This is an issue falling squarely
5 under the USDA's discretion by law. And because there are no legal issues to be
6 considered concerning the USDA's petition denial, Plaintiffs are not entitled to
7 judicial review under 5 U.S.C. § 702.

8 V. CONCLUSION

9 For the reasons discussed above, Defendants' Motion for Judgment on the
10 Pleadings is **GRANTED** (ECF No. 26) and Plaintiffs' Motion for Summary Judgment
11 is **DENIED AS MOOT** (ECF No. 22). Defendants' alternative Motion for Summary
12 Judgment is also **DENIED AS MOOT**. (ECF No. 26.) This case is **DISMISSED**
13 **WITH PREJUDICE**. The Clerk of Court shall close this case.

14 **IT IS SO ORDERED.**

15 March 22, 2013

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18 **OTIS D. WRIGHT, II**
19 **UNITED STATES DISTRICT JUDGE**
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